COURT, U. S.

Supreme Court, U. S.
FILED
1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 74-1172

NORA GARCIA, ROBERT ALANIZ, RANDY JACKSON, RAMON BARERRA, and JOE AGUILAR,

Petitioners,

vs.

WILLIAM GRAY, HOWARD PRICE, FLOYD ECONOMIDES, CHARLES HAMMETT, CECIL HILL, ROBERT BRISINIO, FRED MERMIS, WAYNE KEMP, individually and as members of the City Council of the City of Artesia, and ERNEST THOMPSON, individually and as Mayor of the City of Artesia,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief for Respondent in Opposition

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1172

NORA GARCIA, ROBERT ALANIZ, RANDY JACKSON, RAMON BARRERA, and JOE AGUILAR,

Petitioners,

-v-

WILLIAM GRAY, HOWARD PRICE, FLOYD ECONOMIDES, CHARLES HAMMETT, CECIL HILL, ROBERT BRISINIO, FRED MERMIS, WAYNE KEMP, Individually and as members of the City Council of the City of Artesia, and ERNEST THOMPSON, Individually and as Mayor of the City of Artesia,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court opinion of December 28, 1973 ruled that Ordinance No. 347 of the City of Artesia was valid. The District Court's Memorandum Opinion granting a preliminary injunction with regard to Ordinance No. 343 of the City of Artesia is dated June 22, 1973, not January 22, 1973, as stated in the Petition.

THE CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

Ordinance No. 343 of the City of Artesia is not involved in this case since it was declared unconstitutional by Judge Bratton on equal protection grounds and such decision was not appealed.

QUESTIONS PRESENTED

We are dissatisfied with the Questions Presented portion of the Petition.

In reality, only one issue is present in this case: Does Ordinance No. 347 of the City of Artesia violate on its face the Petitioners' rights under the First and Fourteenth Amendments to the United States Constitution to freedom of speech and to peaceful assembly to petition the Government for redress of grievances?

The question of whether the Ordinance is unduly broad is subsumed under the question of whether the Ordinance is facially unconstitutional. In spite of the contention in the Petition, there is no issue in this case as to the factual application of the Ordinance to the Petitioners. Petitioners have chosen to bring this case for a declaration of unconstitutionality, so no activities of the Petitioners are in question. This makes irrelevant the hypothetical listing of possible factual situations contained

in this portion of the Petition.

In addition, the attempt by Petitioners to claim that the Ordinance is "vague" and that it "does not define 'picketing'" is completely without support. The First Amended Complaint (R. 44) did not raise any issue as to vagueness nor did it raise any question as to a lack of definition of picketing. And the Petition does not make any reference to either vagueness or to a lack of definition of the word "picketing". Thus these elements are simply not questions presented in this case.

STATEMENT OF THE CASE

Statement of Facts

Rule 40 of the Supreme Court Rules requires that a Petitioners' brief contain "a concise statement of the case containing all that is material to the

consideration of the questions presented, with appropriate references . . . to the record . . .". In spite of this rule the Petitioners have submitted a statement of facts containing much irrelevant material (see, e.g., the material on page 18 of the Petition relating to the intent of Petitioners) and alleged facts and evidence which are diametrically opposed to specific findings of the Trial Court and approved by the Court of Appeals. See, e.g., the statement on page 13 of Petitioners' brief that other means of communicating Petitioners' position "were either unavailable to the plaintiffs or inadequate for productive communication to the defendants and the public"--compare with findings by Judge Bratton that "the evidence establishes that there are available to plaintiffs other methods to convey their position and that the plain-

tiffs have effectively availed themselves of such other means of communication". (R. 74). All the evidence purporting to be contrary to this finding cited on pages 13 through 16 of the Petition is therefore irrelevant in the light of this factual finding.

In addition, the Petitioners have failed to make any reference to important relevant evidence that the residential picketing engaged in before enactment of the first ordinance was distressing to the Defendants and others in the City (R. 74; Tr. 70, 87, 89, 140, 160, 179).

There really are only six relevant facts in this case which should be considered by this Court in connection with the Petition for Certiorari, and they have all been found by the Trial Judge in either the first or second of his opinions.

(1) The Petitioners desire to picket the homes of some of the City officials but have refrained because of the Ordinances (Finding, R. 35).

(2) While the unionization attempt and the strike play an important part in the motivation of the Petitioners, their overriding concern is, in labor and other areas, their feeling that there is discrimination against the poor and the ethnic minority in Artesia (Finding, R. 35).

(3) In enacting Ordinance No. 347, the City Council members relied on the advice of their attorney that Ordinance 343 might be found unconstitutional (Finding, R. 73).

(4) The Petitioners' grievances and their desires are well-known by the people they are seeking to inform (Finding, R. 74).

(5) The residential picketing engaged in by Petitioners before enactment of the first ordinance was distressing to the Defendants (Finding, R. 74).

(6) There are available to Petitioners other methods to convey their position and the Petitioners have effectively availed themselves of such other means of communication (Finding, R. 74).

As was quite accurately pointed out by Judge Bratton, the whole question as to the merits of the differences between the parties is not an issue before the Court (Tr. 142), which makes much of the Petitioners' statement of facts completely irrelevant. Moreover, such statements as that the labor dispute was "eclipsed by racial tension" (Petition, page 11) and that "the question of such [racial and ethnic] discrimination pervades the controversy" (Petition, page 12) are

without foundation and are typical of the slanting done by Petitioners in their statement of facts.

ARGUMENT

I

THE DECISION OF THE COURT BELOW IS CLEARLY CORRECT.

Petitioners recognize that the findings of the Trial Court are insulated from review by this Court (footnote 6, page 24 of the Petition). Thus the following findings are fixed as the facts: (1) that Petitioners' grievances and their desires are well-known by the people they are seeking to inform; (2) that the picketing that did occur was distressing to the Defendants; (3) that methods other than residential picketing are available to Petitioners to convey their positions; and (4) that Petitioners have effectively availed themselves of such other means

of communication. Both the trial court and the Court of Appeals recognized that picketing is not an absolute right and that a balancing between the right of privacy and the right to picket is an appropriate legislative function. This Court has also recognized this balancing function of a legislative body. See footnote 5 in Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974). It is only when an ordinance suffers from a clear facial problem, where no balancing is involved, such as the equal protection problem as found by the lower court with regard to Ordinance 343, that the courts act to override legislative action. In a case like that the courts are not substituting their judgment for that of the legislative body with regard to balancing of two rights, each of which is equally worthy of protection, but are instead

applying a constitutional principle which the legislature had no countering constitutional principle to balance against.

Ordinance 347 obviously is not subject to any constitutional attack on equal protection or other similar grounds, so the court below was met only with the question of balancing of two equally important rights. Under these circumstances, courts have consistently refused to reverse the legislative determination. The city officials demonstrated that the picketing was distressing to them and that such picketing was distressing to general residents of Artesia (see, e.g., Tr. 160, 179). The city officials also demonstrated, as found by the trial court, that there were other and effective means of conveying the position of Petitioners to the city officials and other residents of Artesia. Thus the ordinance protects

a valuable constitutional right of privacy of the city officials and other residents of Artesia which would otherwise be destroyed, while at the same time not in any significant way "chilling" the free speech of the Petitioners. The conclusions of the trial court and the Court of Appeals to this effect were clearly correct and certainly do not need to be reviewed by this Court.

II

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW INVOLVED IN THIS CASE WHICH HAS NOT BEEN SETTLED BY THIS COURT.

The critical question of federal law involved in this case has already been definitively decided by this Court, and that is the proposition that the Court will not interfere with the legislative balancing of competing rights. In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) an argument was made that if two unmarried

people could constitute a "family" there would be no reason why three or four might not. This is similar to the argument made by Petitioners that surely the City of Artesia could have allowed some residential picketing at some hour of the day or night by some number of people. This court in Belle Terre stated:

> "But every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function." 416 U.S. at p. 8.

The court in a footnote quoted the following observation by Mr. Justice Holmes from a 1928 case:

> "When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity

> behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark."

With this question having been resolved by this Court and with the facts in the instant case demonstrating that the balancing done by the City of Artesia was reasonable, there is no federal question left in this case. This Court has consistently upheld legislative bans on picketing where the place picketed merited some legislative protection. See, e.g., Adderley v. Florida, 385 U.S. 39 (1966)--jail property; Cox v. Louisiana, 379 U.S. 559 (1965)--courthouse; Grayned v. Rockford, 408 U.S. 104 (1972)--noise outside school buildings; Cameron v. Johnson, 390 U.S. 611

(1968)--picketing of all public buildings; see also Blasecki v. City of Durham, 456 F.2d 87 (4th Cir. 1972), cert. denied, 409 U.S. 912 (1972)--a city park.

The only cases from this Court striking down legislation involving picketing cited at any level of appeal by Petitioners have been Thornhill v. Alabama, 310 U.S. 88 (1940) and Coates v. Cincinnati, 402 U.S. 611 (1971) which both involved ordinances or statutes where the practical effect was to prohibit picketing in business areas, obviously areas where there is no public policy involving privacy. There have been two other cases, Grayned v. Rockford, 408 U.S. 104 (1972) and Police Department v. Mosley, 408 U.S. 92 (1972) where anti-picketing ordinances were declared unconstitutional, but these were both done on equal protection grounds which is not involved in the instant case.

Finally, this Court has made it crystal clear that residences are entitled to protection by a legislative body. For instance, in Kovacs v. Cooper, 336 U.S. 77 (1949), in upholding an ordinance banning sound trucks on streets, Mr. Justice Read stated at pages 86-87:

> "The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape the interference with his privacy by loudspeakers except through the protection of the municipality." [Emphasis supplied].

In Cohen v. California, 403 U.S. 15, rehearing denied, 404 U.S. 876 (1971) the court stated at 403 U.S. 21:

> "While this court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue . . ., we have at the same time consistently stressed that we are

> often 'captives outside the sanctuary of the home and subject to objectionable speech'". [Emphasis supplied].

One of the most articulate and persuasive espousals of the rights of people to be free from picketing of their homes is contained in a concurring opinion by Mr. Justice Black in Gregory v. Chicago, 394 U.S. 111 (1969)

> "And perhaps worse than all other changes, homes, the sacred retreat to which families repair for their privacy and their daily way of living, would have to have their doors thrown open to all who desired to convert the occupants to new views, new morals, and a new way of life. Men and women who hold public office would be compelled, simply because they did hold public office, to lose the comforts and privacy of an unpicketed home. I believe that our Constitution, written for the ages, to endure except as changed in the manner it provides, did not create a government with such monumental weaknesses. Speech and press are, of course, to be free, so that public matters can be discussed with impunity.

> But picketing and demonstrating can be regulated like other conduct of men. I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown." 394 U.S. at 125.

Thus all the essential legal elements which are necessary to the opinion of the Court of Appeals have been decided by this Court, and the application of the legal principles to the facts in the instant case was an easy matter, leading to the upholding of Ordinance No. 347.

III

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT BELOW AND ANY DECISIONS OF THIS COURT, OR ANY OTHER CIRCUIT OR OF ANY STATE.

Petitioners in Point II of the Petition do not cite a single case from this

Court which is in conflict with the decision of the Court below. All are significantly different on their facts, and many do not even involve picketing. The case of Martin v. Struthers, 319 U.S. 141 (1943) at first blush seems the closest case to a conflict. There an ordinance prohibiting a person distributing handbills from ringing doorbells or knocking on the door of residents was overturned. In doing so, however, the Court noted that the home owner could protect his privacy by posting a notice that he did not wish to be disturbed. This, of course, is a choice that a home owner about to be picketed does not have and makes the Martin case actually supportive of the position of the Court below in this case.

There have been only three decisions in the other courts in the United States involving the pure question of a ban on

residential picketing (one not involving a successful equal protection clause attack), and all have decided that the ban was constitutional. City of Wauwatosa v. King, 49 Wisc. 2d 398, 182 N.W.2d 530 (1971); City of Brookfield v. Groppi, 50 Wisc. 2d 166, 184 N.W.2d 96 (1971); People v. Doorley, 338 F.Supp. 574 (D.R.I. 1972); reversed on equal protection clause grounds, 468 F.2d 1143 (1st Cir. 1972).

The two circuit court cases cited in the Petition on page 30, Davis v. Francois, 395 F.2d 730 (5th Cir. 1968) and Mosley v. Police Department, 432 F.2d 1256 (7th Cir. 1970), aff'd on other grounds, 408 U.S. 92 (1972) did not involve bans on residential picketing.

In Davis the ordinance banned two or more persons from picketing in front of residences, places of business or public buildings. This obviously effectively

banned all picketing everywhere in the city, including business property where there was no protected right to be balanced against by the legislative body. Thus the statute was declared unconstitutional. The picketing in question was not picketing of a residence. In Mosley the ordinance prohibited picketing within 150 feet of a school from one-half hour before school opened until one-half hour after school closed and had nothing to do with residential picketing. Moreover, Mosley was decided by this court solely on an equal protection basis. Thus neither of these straw men constitutes a conflicting opinion.

The state court cases set out on page 30 of the Petition are equally inapplicable. In Flores v. Denver, 122 Colo. 71, 220 P.2d 373 (1950) there was no anti-picketing ordinance involved but only a disorderly conduct ordinance which

was used to make the arrest. Obviously when dealing with a disorderly conduct ordinance there is no clear legislative decision performing the balancing function between rights which, as we have seen above, is a vital factor in the decisions of the courts upholding statutes and ordinances forbidding picketing activity. Thus a disorderly conduct case does not provide any guide as to how the court would react to an ordinance specifically banning residential picketing. In State v. Anonymous, 6 Conn. Cir. 372, 274 A.2d 897 (1970) the Connecticut court actually ducked the First Amendment problem by deciding that a residential anti-picketing statute did not apply in a non-labor situation. Such a case again is not in conflict with the decision of the Court below.

Opinions of law students and other writers in law reviews are just that,

and do not create a conflict of decisions when none exist.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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April 10, 1975